89-525

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Does the holding of *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), that a federal magistrate lacks jurisdiction to preside at jury selection at a felony trial require reversal of a conviction where the defendant neither consented nor objected to such an unauthorized procedure?

II. Does a federal felony defendant waive his personal right to trial before a tribunal with jurisdiction to preside merely by failing to object, where Congress has expressly required that such waivers be unequivocal, knowing, voluntary, and written?

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No. ___

AHMADE RATEB POPAL

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ahmade Rateb Popal, respectfully requests that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceedings on June 29, 1989.

The circuit court affirmed petitioner's felony conviction in the United States District Court, Eastern District of New York, even though jury selection was conducted by a magistrate who, under the rule announced in *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), did not have jurisdiction to preside. Petitioner did not execute a written consent to this procedure, nor did he knowingly and voluntarily waive his right to the presence of a district

judge. Jury selection was conducted by Magistrate John L. Caden; the balance of the trial was held before the Honorable Raymond J. Dearie, District Judge.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (Dearie, J.) wrote no opinion in this case. The unpublished opinion of the United States Court of Appeals for the Second Circuit affirming petitioner's conviction on other grounds is reprinted in the appendix hereto at pp. 1a-3a.

JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Petitioner requests that the Court review this petition on the merits, even though it is untimely, because he has acted diligently and is not responsible for any of the delay, and because of the seriousness of the case: he is serving a 151-month sentence. Although the court of appeals' order affirming petitioner's conviction is dated June 29, 1989, the court did not at that time notify petitioner or his counsel. Indeed, unaware of the decision, prior counsel attempted by letter dated July 19, 1989, following *Gomez*, to notify the court of appeals of the existence of the magistrate issue, only to learn subsequently that the appeal already had been denied. Regrettably, prior counsel did not so notify petitioner, who is incarcerated, until August 10, 1989. Counsel's terse letter did not inform petitioner of his right to petition for rehearing or for *certiorari*. When undersigned counsel was retained in late August, he was misinformed by the circuit court clerk's office that judgment had been entered on July 21, 1989 (in fact, the date the mandate issued), as opposed to

June 29th. When counsel learned of this mistake, the August 29th deadline for a timely petition for *certiorari*, or for a motion for a 30-day extension, had passed. Nevertheless, this petition is being filed within the 30-day extension period ordinarily granted by motion.

STATUTES INVOLVED

Title 28, United States Code, Section 636 (in pertinent part):

> **§ 636. Jurisdiction, powers, and temporary assignment.**
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (c) Notwithstanding any provision of law to the contrary—
>
> (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor

the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matters to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

Title 18, United States Code, Section 3401 (in pertinent part):

§ 3401. Misdemeanors; application of probation laws

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

STATEMENT OF THE CASE

On August 4, 1988, petitioner was indicted on narcotics charges and the case was assigned to Judge Dearie. In October, Judge Dearie assigned jury selection to the magistrate, without explaining to petitioner his right to have the district court preside, and without obtaining verbal or

written consent. At that time, settled law in the Second Circuit held that a defendant had *no* right to the presence of a district judge during jury selection; a magistrate's substitution was considered lawful even over a defendant's objection. *See United States* v. *Garcia*, 848 F.2d 1324 (2d Cir. 1988), *rev'd sub nom. Gomez* v. *United States*, 109 S.Ct. 2237 (1989). Petitioner did not lodge a futile objection.

On October 24, 1988, Magistrate Caden held jury selection.[1] Two days later, without affording petitioner any opportunity for further review, Judge Dearie swore the panel and began receiving evidence. After a two-day trial, the magistrate-selected jury found petitioner guilty on all three counts. On February 3, 1989, petitioner was sentenced to 151 months in prison, a fine of $50,000, a special assessment of $150, and five years of supervised release. He is presently serving his sentence at the Federal Correctional Institution, Raybrook, New York.

In his appeal to the circuit court, petitioner challenged the sufficiency of the evidence and the district court's application of the sentencing guidelines, but did not raise the jury selection issue. In April 1989, when petitioner's appellate brief was filed, not only was no right to have a district judge conduct jury selection recognized in the

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[1] The transcript of the pre-jury selection proceedings was not ordered for purposes of the appeal in the court of appeals. While petitioner, through present counsel, attempted to do so in August, the court reporter's office as of this writing has been unable to identify the reporter who recorded this proceeding, but is continuing its efforts to do so. The District Court docket sheet, reproduced in the joint appendix in the court of appeals, indicates that notice of jury selection by the magistrate was issued by mail on October 5, 1988, but does not reflect that petitioner ever expressly consented, either verbally or in writing.

Second Circuit, *see Garcia, supra;* a defendant who failed to object at trial waived any appellate claims. *See United States* v. *DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984).

On June 29, 1989, the court below, in an unpublished order, denied petitioner's appeal. On July 19, 1989, petitioner's prior counsel, evidently unaware of the court's decision, wrote the circuit court advising it that petitioner's case raised a *Gomez* issue.[2] When petitioner belatedly learned from his attorney on August 10, 1989, that his appeal had been denied, he substituted undersigned counsel as his appellate attorney. New counsel then filed a motion in the court of appeals seeking permission to file an untimely petition for rehearing *en banc* raising the *Gomez* issue. This motion is *sub judice*.[3]

By separate motion herewith, petitioner is requesting this Court to defer consideration of this petition for *certiorari* pending a final determination in the court below.

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[2] *Gomez* had been announced on June 12, 1989.

[3] Undersigned counsel attempted to file the petition for rehearing *en banc* and motion to proceed out of time on August 22, 1989, but the clerk's office would not accept these papers until petitioner executed a stipulation of substitution of counsel. This stipulation was obtained as quickly as possible by mail from the prisoner and was filed on September 5, 1989, but the court did not "approve" the stipulation for eight days. Only then did it accept petitioner's papers.

REASON FOR GRANTING THE WRIT

THE HOLDING IN *GOMEZ* V. *UNITED STATES* THAT A MAGISTRATE LACKS JURISDICTION TO CONDUCT JURY SELECTION IN A FELONY TRIAL REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED, AT LEAST WHERE HE DID NOT EXECUTE A KNOWING, VOLUNTARY, WRITTEN CONSENT; ALTERNATIVELY, THE COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS CONCERNING GOMEZ'S APPLICATION TO CASES IN WHICH THE DEFENDANT FAILED TO OBJECT

In *Gomez* v. *United States*, *supra*, this Court unanimously held that the Federal Magistrates Act, 28 U.S.C. §§ 631 *et seq.*, does not empower a district court to assign, nor a magistrate to conduct, the fundamentally important function of presiding at jury selection for a federal felony trial. The Court noted that the magistrate's criminal trial jurisdiction is limited to misdemeanors and "depends on the defendant's specific, written consent." 109 S.Ct. at 2245. Observing, as the government conceded, that Congress had withheld authority for magistrates to preside at a felony trial, *id.*, the Court concluded that jury selection was a "critical stage[]" of the trial and that a magistrate who conducts this function "exceeds his jurisdiction." 109 S.Ct. at 2248. Reasoning further that a defendant's personal right to have jury selection conducted by a person with "jurisdiction to preside" is "basic," the Court rejected the government's harmless error argument. *Id.*

Because a magistrate who lacked jurisdiction presided at jury selection in petitioner's case, *Gomez* requires that this conviction, too, be reversed.[4] At the very least, this Court should direct the circuit court to reexamine its

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[4] *Gomez* was decided when this case was on direct appeal, and thus clearly applies retroactively to it. *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987).

pre-*Gomez* rule that the failure to object constitutes a waiver of this defect. *See United States* v. *DeFiore*, *supra*. Even after *Gomez* was decided, the Second Circuit refused to reconsider its pre-*Gomez* waiver rule even though, as Judge Altimari pointed out in dissent, *Gomez* was decided on jurisdictional grounds. *Compare United States* v. *Mang Sun Wong*, ___ F.2d ___, Dkt. No. 88-1100, Slip Op. 7531, 7551-52 n.2 (2d Cir., Sept. 5, 1989) (*on pet. for reh.*) with *id.* at 7552-53 (dissenting opinion).

The circuit court's waiver rule squarely conflicts with *Gomez* and is logically untenable. As the Ninth Circuit, which is thus in conflict with the Second, correctly held in *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989), a failure to object cannot waive the jurisdictional defect noticed in *Gomez*. Not only does *Gomez* hold that a magistrate has no *felony* trial jurisdiction, but Congress further circumscribed magistrates' criminal trial jurisdiction with a requirement that the defendant provide his "specific, written consent." 109 S.Ct. at 2245. Petitioner's mere acquiescence could not empower the magistrate to exercise authority that Congress had withheld. *See California* v. *LaRue*, 409 U.S. 109, 112 n.3 (1972) (parties may not confer jurisdiction upon a court by stipulation) (dictum); *McClaughry* v. *Deming*, 186 U.S. 49 (1902) (defendant's failure to object could not confer jurisdiction upon military court martial acting outside its statutorily-created jurisdiction). "[F]ederal courts are courts of limited jurisdiction marked out by Congress," *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976), which possesses "the sole power of creating the tribunals and of investing them with jurisdiction." *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). *See, e.g.*, 18 U.S.C. § 3231 (assigning to the district courts exclusive, original jurisdiction "of all offenses against the

laws of the United States"). If a felony defendant could empower a magistrate to act where Congress had withheld such authority, then theoretically the defendant could stipulate to trial before an arbitrator or a citizen off the street.[5]

Besides characterizing the defect as jurisdictional, *Gomez* also established that a defendant has a "basic" *personal right* to the presence of a "person with jurisdiction to preside" during the jury selection phase of a felony trial. 109 S.Ct. at 2248. Whatever the constitutional source of this right—Article III, the Fifth Amendment's due process clause, or the Sixth Amendment's right to trial by jury—its waiver surely must be knowing, voluntary, and unequivocal. *See, e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *McCarthy* v. *United States*, 394 U.S. 459 (1969); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); Fed. R. Crim. P. 11(c)(3). The standards for determining waiver are highest where trial rights are involved. *See generally Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237-38 (1973).

The Magistrates Act codifies these constitutionally-based waiver principles, and adds further procedural safeguards: written consent in criminal cases, *see* 18 U.S.C. § 3401(b), and prohibition in civil cases of any attempt by the district judge or magistrate to "attempt to persuade or induce any party to consent." *See* 28 U.S.C. § 636(c)(2). *See generally, Gomez* v. *United States*, *supra*, at 2244-45. Petitioner's mere acquiescence, implied from his failure to explicitly object, did not meet constitutional

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[5] Even if a felony defendant somehow could empower a magistrate to conduct jury selection by consent, *a fortiorari* petitioner's acquiescence would not suffice given the express, written statutory consent requirements for misdemeanors and petty offenses.

standards, let alone the more rigorous statutory waiver procedure required by Congress.

The Second Circuit's continued adherence to the pre-*Gomez* waiver rule pronounced in *DeFiore* not only conflicts with the Ninth Circuit's recent decision in *United States* v. *France*, *supra*, but also with other decisions requiring literal compliance with the statute's trial-related waiver requirements in criminal cases. *See, e.g.*, *United States* v. *Marcyes*, 557 F.2d 1361, 1367 (9th Cir. 1977) (defendant's written consent was insufficient absent clear explanation on the record of his right to elect a jury trial in the district court); *United States* v. *Miller*, 468 F.2d 1041, 1043 (4th Cir. 1972) (same), *cert. denied*, 410 U.S. 935 (1973). Similarly, in civil cases, the lower courts have viewed the failure to literally comply with the Act's requirement of an express, unambiguous, knowing waiver as a jurisdictional defect that may be raised at any time. *See Lovelace* v. *Dall*, 820 F.2d 223, 225-26 (7th Cir. 1987); *Hall* v. *Sharpe*, 812 F.2d 644 (11th Cir. 1987); *Caprera* v. *Jacobs*, 790 F.2d 442, 444-45 (5th Cir. 1986); *Ambrose* v. *Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984) (court of appeals *sua sponte* dismissed civil appeal due to defective, district court waiver procedure).

Whether petitioner's present challenge is based upon notions of jurisdiction, individual rights, or both, his failure to lodge a contemporaneous objection in the trial court cannot be held against him where such an objection would have been futile. "[T]he failure to object at trial does not constitute a waiver of [a] claim" where no objection was available. *Miranda* v. *Arizona*, 384 U.S. 436, 495 n.69 (1966). Petitioner should not be "penalized for abiding by the controlling law at the time." *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989) (reversing conviction where the

defendant had failed to object to assignment of jury selection to a magistrate). The failure to make a claim that would conflict with settled law does not constitute a waiver of a subsequently-established right. *Guam* v. *Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc) (and cases discussed therein); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632, 634 n.2 (3rd Cir.), *cert. denied sub nom. O'Connor* v. *Yeager*, 395 U.S. 923 (1969); *United States* v. *Indiviglio*, 352 F.2d 276, 280 n.7 (2d Cir. 1965). Any contrary rule would encourage, indeed require, defense counsel to continually object to settled principles and to burden district courts with futile objections and claims. *United States* v. *France*, *supra*. Significantly, this Term the Court is confronting for the first time the scope of Rule 11 of the Federal Rules of Civil Procedure, which holds attorneys personally responsible for making frivolous objections or claims. *See Calloway* v. *Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), *cert. granted sub nom. Pavelic & LeFlore* v. *Marvel Entertainment Group*, 109 S.Ct. 1116 (1989).

Finally, under the jurisdictional nature of the Court's analysis in *Gomez* and the futility doctrine, this would not appear to be an appropriate case for application of the "plain error" doctrine. Indeed, even before *Gomez*, Justice White observed that, if the use of a magistrate to select a jury at a felony trial "violates either the [Magistrate's] Act or the Constitution, then it is not obvious that this violation can be dismissed under the 'plain error' doctrine." *Ford* v. *United States*, ___ U.S. ___, 108 S.Ct. 741, 742 (1988) (dissenting from denial of *certiorari*). *Gomez* makes clear that the error in substituting a magistrate for the district judge during jury selection deprives a felony defendant of a "substantial right" and, given the impossibility of establishing specific harm, requires that

"unfair prejudicial impact" be presumed. *See, e.g., Gomez, supra,* at 2247-48 ("[N]o transcript can recapture the atmosphere of the *voir dire,* which may persist throughout the trial"); *United States* v. *Young,* 470 U.S. 1, 16 n. 14 (1985). Additionally, the use of a tribunal lacking authority or jurisdiction to act surely "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U.S. 157, 160 (1936), quoted in *Young, supra,* at 15. There is a public interest in the administration of the federal criminal justice system by judicial officers with authority to act that transcends the failure by an individual defendant to object. *See, e.g., United States* v. *Garcia,* 848 F.2d at 1337 (Chief Judge Oakes, dissenting) (delegation of jury selection to a magistrate "demeans the process" in the jury's eyes).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted and the judgment of the court of appeals summarily reversed, or else the judgment should be vacated and the matter remanded to the court below with a direction to reconsider that court's waiver rule in light of *Gomez* v. *United States*. Alternatively, the matter should be set down for full briefing and argument to resolve the important conflict in the lower courts concerning the application of *Gomez* to those cases in which the defendant did not object to the magistrate's improper exercise of jurisdiction to conduct jury selection.

Respectfully submitted,

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DATED: New York, New York
September 26, 1989

APPENDIX

APPENDIX

United States Court Of Appeals

FOR THE
SECOND CIRCUIT

89-1067

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and eighty-nine.

Present:

Hon. James L. Oakes,
Chief Judge.
Hon. Ellsworth A. Van Graafeiland,
Hon. George C. Pratt,
Circuit Judges.

United States of America,

Appellee,

v.

Ahmade Rateb Popal,

Appellant.

FILED JUNE 29 1989

ORDER

ISSUED AS MANDATE: July 21, 1989

Ahmade Rateb Popal appeals from a judgment of conviction in the United States District Court for the Eastern District of New York, Raymond J. Dearie, Judge. Appellant was convicted after a jury trial of conspiring to import and possess with

intent to distribute heroin, in violation of 21 U.S.C. § 846 (1982), of importing in excess of one kilogram of heroin, in violation of 21 U.S.C. § 952(a), and of possessing with intent to distribute in excess of one kilogram of heroin, in violation of 21 U.S.C. § 841(a)(1). He was sentenced under the Sentencing Reform Act, 18 U.S.C. § 3551 et. seq. (Supp. V 1987), to concurrent prison terms of 151 months, followed by five years of supervised release. He was also fined $50,000 and ordered to pay a special assessment of $150. On appeal, Popal argues (1) that the evidence of his guilt was insufficient and (2) that the district judge could have and should have departed downwardly from the Sentencing Guidelines.

With respect to his first contention, Popal compares his case to that of the successful appellant in *United States* v. *Nusraty*, 867 F.2d 759 (2d Cir. 1989). In *Nusraty*, the Government's case rested upon the appellant's presence in an airport, his meeting with an acquaintance found to have imported heroin and the appellant's false exculpatory statement. *Id.* at 764-65. This was insufficient under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), and its progeny. *Id.* at 765.

We find that the circumstantial evidence of Popal's guilt is considerably greater. Popal's arrival in Shamsul Haq's hotel room, following Haq's arrest at the airport, and Haq's two telephone conversations in his hotel room, permit the inference that Popal learned where Haq was located from the person in Pakistan whom Haq had telephoned. Popal's meeting with Haq then provided sufficient evidence for a jury rationally to conclude that Popal had come to the hotel to take a consignment of heroin from Haq. We conclude that appellant has failed to sustain the heavy burden of showing that the evidence of his guilt was insufficient. *See United States* v. *Young*, 745 F.2d 733, 762 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

Appellant claims that the district judge was unaware of his discretion to sentence outside and below the Sentencing Guidelines or that he misconstrued his authority to depart from the Guidelines. Popal points to mitigating factors—e.g.,

his military service as an Afghan Mujahedeen fighting against the Russians—that could and should have been considered as grounds for downward departure under 18 U.S.C. § 3553(b). Our reading of the sentencing proceedings below convinces us that Judge Dearie was aware of his discretion to depart from the Guidelines. The judge noted that the information presented by Popal was worthy of consideration, but decided that it did not merit downward departure from the Guidelines. This was a proper exercise of the judge's discretion. *See United States* v. *Paulino*, No. 88-1433, slip op. at 2692 (2d Cir. Apr. 13, 1989) (per curiam); *United States* v. *Correa-Vargas*, 860 F.2d 35, 36-40 (2d Cir. 1988).

Judgment affirmed.

/s/ James L. Oakes
JAMES L. OAKES, CHIEF JUDGE

/s/ Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND

/s/ George C. Pratt
GEORGE C. PRATT, CIRCUIT JUDGES